Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

**No. 78-889**

CITY OF IMPACT, DALLAS PERKINS, NANCY PERKINS, his wife, R.L. PERKINS, DICKIE W. MAXWELL, MARION TEEL, IMPACT DEVELOPMENT CORP., TOM RODEN, and PINKIE'S INC.,

*Petitioners,*

v.

EDGAR E. WHITWORTH, d/b/a DINKIE'S FOOD MART,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the Court of Appeals fail to comply with this Court's order of remand?

2. Must a private antitrust litigant alleging a conspiracy between municipal officials and others to violate the Sherman Act establish, as a prerequisite to recovery, the invalidity under the state law of acts of the defendant officials in furtherance of the conspiracy?

3. Is an antitrust claim barred on grounds of "standing" merely because the defendants' allegedly anticompetitive conduct has succeeded in making it impossible under state law for the plaintiff to open his business?

## STATEMENT OF THE CASE

This is a private antitrust suit which seeks to force competition on a handful of closely related persons and entities who control both the retail liquor business and the local government of Impact, Texas, a tiny but lucrative "'oasis' in the middle of a vast expanse of 'dry' territory" in western Texas. (Pet. 32). Impact is comprised of approximately forty-seven acres and was incorporated as a municipality by the petitioner Dallas Perkins in 1961. At that time, the sale of alcoholic beverages was prohibited in neighboring Abilene, a city of over 90,000 people, in Taylor County, and in most surrounding counties. (Pet. 33-35). Shortly after incorporation, a local option election was held, and by a vote of 27-0 the citizens of Impact legalized the sale of all types of alcoholic beverages for off-premises consumption. (Pet. 35). Within six months following that election, the governing body of Impact had enacted three ordinances, the combined effect of which was to restrict the sale of alcoholic beverages to areas within Impact owned or controlled by Mr. Perkins, the petitioner Tom "Pinkie" Roden, or their respective corporate alter egos.[1]

[1]Among these ordinances are one enacted on August 17, 1961, establishing residential limits of Impact, one enacted on September 21, 1961, entitled "An Ordinance Prohibiting the Sale of Beer, Wine, *(continued)*



At the time this suit was filed, three business establishments were licensed to sell alcoholic beverages on a retail, off-premises basis in Impact, including one owned by Dallas Perkins, one owned by Tom "Pinkie" Roden, and one owned by Pinkie's, Inc. The five-member City Council of Impact at that time included Dallas Perkins, his wife, his father, Dickie W. Maxwell (an employee of the liquor store owned by Pinkie's, Inc.), and Marion Teel (an employee of the liquor store owned by Tom "Pinkie" Roden). (R. 92). All of these persons are named as defendants in both their individual and official capacities.

Impact bears little resemblance to most other cities. Virtually all of its few commercial buildings are used in connection with the sale of alcoholic beverages; there are no public buildings, churches or schools. (Pet. 35). Whatever its shortcomings as a city, however, Impact has unquestionably been an effective device for the maintaining of a geographical retail liquor monopoly. Until 1978, the nearest location to Impact where alcoholic beverages were sold on a retail basis for off-premises consumption was approximately thirty-eight miles away. Not surprisingly, retail prices of liquor at the three outlets in Impact were significantly higher than in other locations. (R. 92). Although not reflected in the record, voters in the neighboring city of Abilene recently approved by a narrow margin the retail sale of alcoholic beverages in that municipality.

*(footnote continued from preceding page)*
Liquor or Other Intoxicating Beverages Within the Residential Limits of the City of Impact, Texas; and Providing a Penalty," and one enacted December 29, 1961, entitled "Zoning Ordinance for the City of Impact, Texas." (R. 115-16).

On June 16, 1975, the respondent, through his attorney, submitted to the petitioner Nancy Perkins, in her capacity as Secretary of the City of Impact, an Application for a Wine and Beer Retailer's Off-Premises License, which under Texas law must be signed by the City Secretary before being submitted by the applicant to the Texas Alcoholic Beverage Commission. (R. 116, 119). On July 1, 1975, Nancy Perkins responded, stating that because city ordinances prohibited the sale of alcoholic beverages on respondent's lot, where he planned to locate his business, she would not sign the application. (R. 116-17, 124). Because of Nancy Perkins' refusal to sign this application, the respondent is unable to engage in the business of the retail sale of alcoholic beverages in Impact. This action ensued, the respondent claiming, inter alia, that the enactment of the ordinances referred to previously and the refusal to sign his application constitute overt acts in furtherance of a conspiracy to restrain competition in the retail sale in Impact of alcoholic beverages for off-premises consumption. (R. 115-17).

On January 29, 1976, the District Court entered a summary judgment for the defendants on the ground that the City's valid zoning ordinance, under which the operation of a liquor business on plaintiff's property is prohibited, bars recovery regardless of whether defendants' actions otherwise violate the antitrust laws. (Pet. 37-40).

In September 1977, the United States Court of Appeals for the Fifth Circuit reversed the decision of the District Court, holding that "[t]he mere presence of the zoning ordinance does not necessarily insulate the defendants from antitrust liability where, as here, the



plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade." (Pet. 24). In addressing the defendants' argument that their conduct was shielded from immunity by the so-called "state action" exemption to the antitrust laws, the court below distinguished *Parker v. Brown*, 317 U.S. 341 (1943), as follows:

> [T]hat case involved "no question of the state or its municipality becoming a participant in a private agreement or combination by others for the restraint of trade." 317 U.S. at 351-352, 63 S.Ct. at 314. That is the question here. (Pet. 27).

Following the Fifth Circuit's September 1977 decision the City and its fellow defendants petitioned this Court for a writ of certiorari. On April 24, 1978, in accordance with the treatment given several pending cases, the writ in this case was granted and the case was remanded to the Fifth Circuit "for further consideration in light of *City of LaFayette v. Louisiana Power and Light Co.*, [435 U.S. 389 (1978)]." 435 U.S. 992 (1978).

On July 17, 1978, the Fifth Circuit announced in a *per curiam* opinion that, in keeping with this Court's direction, it had reconsidered the case in light of the *City of LaFayette* decision. The Fifth Circuit ordered the remand of the case to the District Court for further proceedings consistent with its September 1977 opinion and that of this Court in *City of LaFayette*.

## REASONS FOR DENYING THE PETITION

### 1. The Court of Appeals acted well within its discretion in reaching its decision on remand without requesting additional briefing or argument and in entering only a *per curiam* opinion.

Despite petitioners' attempts at pages 6-15 of the Petition to draw this Court into a full-dress review of the application of *City of LaFayette* to the pleadings and summary judgment proof in this case, the question actually presented for review is a much narrower one: Has the Court of Appeals complied with this Court's order to reconsider the September 1977 Fifth Circuit decision in light of *City of LaFayette*?

Petitioners' argument on this vital issue is essentially two-fold. First, while conceding that the Fifth Circuit "may very well have studied the delicate standards of *City of LaFayette* and applied them to this case," (Pet. 15), petitioners complain of the terseness of the Fifth Circuit's opinion and "suggest that, at a minimum, the Fifth Circuit should have explained its holding and its views of the *City of LaFayette* * * * * " (Pet. 16). Secondly, petitioners grouse about their not having been afforded an opportunity to present a brief on the "subtle changes introduced by *City of LaFayette*." (Pet. 15-16).

Clearly, the Fifth Circuit acted reasonably and within its discretion. The Court of Appeals was directed only to consider the effect, if any, of the *City of Lafayette* decision on its prior holding. It is submitted that Judge Tuttle and his fellow panelists were fully



capable of performing that task without the aid of additional briefing and argument by counsel.

As for the terseness of the Fifth Circuit's opinion on remand, it must be remembered (1) that the September 1977 Fifth Circuit opinion in this case relied heavily on that court's opinion in *City of LaFayette*, and (2) that the standard established by the Supreme Court plurality in *City of LaFayette* for deciding whether a city's anticompetitive conduct is exempted from the antitrust laws is precisely the same as that set forth in the Fifth Circuit's *City of LaFayette* opinion. In fact, in announcing its holding, the opinion of the plurality of this Court in *City of LaFayette* quoted directly from the Fifth Circuit's opinion in that case as follows:

> [W]e agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area that the legislature contemplated the kind of action complained of." 532 F.2d, at 434.

435 U.S. at 415.

Since, in its September 1977 opinion in this case, the Fifth Circuit had already measured the pleadings and summary judgment proof by exactly the same yardstick later employed by the plurality in *City of LaFayette*, it should not be amazing that, on remand, the Fifth Circuit panel saw no overwhelming necessity to publish yet another elaborate opinion. In any event, the Court of Appeals clearly did not abuse its discretion in favoring brevity over redundancy.

**2. The Fifth Circuit's decision to remand the case to the District Court does not conflict at all with *City of LaFayette* and other decisions of this Court.**

Petitioners argue strenuously that on the basis of the five opinions filed in *City of LaFayette*, the Fifth Circuit was required to affirm the District Court's granting of a summary judgment for defendants. (Pet. 6-15). This argument overlooks entirely that plaintiff's pleadings below contain allegations that, at this point, must be accepted as true and that go well beyond the type of anticompetitive conduct claimed in *City of LaFayette*. Specifically, as the Fifth Circuit pointed out in its September 1977 opinion, "Plaintiff clearly alleges that the Defendants enacted the [zoning] ordinance for the express purpose of excluding him from the liquor business in violation of their conspiracy." 559 F.2d at 380. Like allegations are made respecting the passage of the City of Impact's liquor control ordinance and the refusal of the City Secretary to sign plaintiff's application for a license to sell alcoholic beverages. These allegations of a conspiracy by municipal officials with private parties place this case in a category different from that under consideration in *City of LaFayette*.

To understand the importance of the allegations in this case of a private conspiracy, it is necessary to return to this Court's decision in *Parker v. Brown*, 317 U.S. 541 (1943). In *Parker*, a private grape grower and packer challenged the administration by California officials of a legislatively mandated raisin marketing program which had anticompetitive effects. Assuming



for purposes of its decision that the program would violate the Sherman Act if conducted by private individuals, the Court nevertheless held the actions of the state officials to be outside the reach of the antitrust laws. The Court stated that there is

> nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.

However, the Court expressly reserved for later decision the "question of the state or its municipality becoming a *participant* in a private agreement or combination by others for restraint of trade." 317 U.S. at 351-52 (Emphasis added). Further, the Court noted:

> The state in adopting and enforcing the prorate program made no contract or agreement and *entered into no conspiracy in restraint of trade or to establish monopoly*, but as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. (Emphasis added).

317 U.S. at 352.

The suggestion of the Court in *Parker* that a contrary result would be indicated if allegations were made of participation by public officials in a private conspiracy has been borne out in later decisions of this Court.[2] In

[2]The lower courts have also held that public officials who participate in private schemes to violate the antitrust laws are thereby deprived of any state action immunity. See *Duke & Co., Inc. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975); *Herman v. Valley National Bank of Arizona*, 339 F.2d 564 (9th Cir. 1964) [also cited for the above proposition by this Court in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 513 (1972)], *Windham v. American Brands, Inc.*, 1975-2 Trade Cases ¶60,530 (S.D.S.C. 1975); *Azzaro v. Town of Branford*, 1974-2 Trade Cases ¶75,337 (D.Conn. 1974); *Fox v. James B. Beam Distilling Co.*, 1974-2 Trade Cases ¶75,375 (S.D. Ind. 1974).

*Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the Court found no governmental immunity where the complaint alleged that the defendant parent company had conspired with one of its subsidiaries, the officially appointed buying agent for an arm of the Canadian government, to prevent plaintiff's competing for the Canadian business. Later, in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972), the *Continental Ore* decision was cited for the proposition that "conspiracy with a licensing authority to eliminate a competitor may. . . result in an antitrust transgression."

Still more recently, the same principle was announced in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975). In *Goldfarb,* consumers of legal services sued the Virginia State Bar, a state agency. They claimed that the Bar had violated the Sherman Act by issuing "suggested" minimum fee schedules which were adopted in substance by local bar associations, and by issuing ethical opinions enforcing the local fee schedules. The Court observed:

> The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. Cf. *Gibson v. Berryhill*, 411 U.S. 567, 578-579 (1973). *The State Bar*, by providing that deviation from County Bar minimum fees may lead to disciplinary action, ***has voluntarily joined in what essentially is a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.*** (Emphasis added). (Footnote omitted).

421 U.S. at 792.



In short, this Court has consistently held that, whatever the usual antitrust liabilities of a public official, no immunity is offered when he undertakes to participate in a private conspiracy with others to violate the antitrust laws. The petitioners herein are alleged to have engaged in both their official and individual capacities in a private conspiracy for private gain and, accordingly, may be held accountable under the Sherman Act.

It is against the foregoing background that this Court's decision in *City of LaFayette* must be viewed. As Justice Blackmun observed in his dissenting opinion, the question of whether the *City of LaFayette* had acted in concert with private parties was before neither this Court nor the Court of Appeals in that case. 435 U.S. at 444. Moreover, as Justice Blackmun noted, "[t]o grant immunity to municipalities in such a circumstance would go beyond the protections previously accorded to officials of the States themselves." *Id.* It is clear, accordingly, that nothing in any of the opinions filed in *City of LaFayette* would preclude a recovery by the plaintiff in this case, in which a conspiracy with private parties is alleged.

Apart from its consistency with the decisions of this Court respecting the liability of public officials who engage in private antitrust conspiracies, the Court of Appeals' holding is also totally compatible with other aspects of the various opinions filed in *City of LaFayette*. One factor that has always been carefully scrutinized by this Court in cases involving the *Parker* exemption has been the degree of involvement of the state acting as a sovereign. The above-quoted language from *Parker* makes clear that the Court regarded it as a

case in which the state legislature had itself mandated the anticompetitive conduct complained of. The *Parker* requirement that the anticompetitive conduct be mandated by the state has been repeatedly emphasized by this Court. See *Goldfarb v. Virginia State Bar*, *supra*, 421 U.S. at 790; *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 706 (1962) (referring to *Parker* as a case of "mandatory" state regulation and refusing to find governmental immunity where there was no evidence of express governmental approval of the conspiracy in which a defendant government agent allegedly participated); *Schweggman Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951) (referring to *Parker* as a case in which "a state *compels* retailers to follow a parallel price policy and *demands* private conduct which the Sherman Act forbids") (Emphasis added).

The opinions of the plurality and of Chief Justice Burger in *City of LaFayette* clearly continue the longstanding requirement that anticompetitive conduct must be directed by the State in order to qualify for *Parker* protection. The plurality concluded, for example, that

> in the absence of evidence that the State authorized or directed a given municipality to act as it did, the actions of a particular city can hardly be found to be pursuant to *"the state[s] command,"* or to be restraints that *"the state * * * as sovereign" imposed.* [Quoting *Parker*, 317 U.S. at 352] [Emphasis added].

435 U.S. at 414. The plurality went on to note that

> an adequate state *mandate* * * * exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." [Quoting from the Fifth Circuit's opinion, 532 F.2d at 434] [Emphasis added].



*Id.* at 415. By footnote, however, the plurality stressed that they rejected "petitioners' fallback position that an antitrust claim will not lie for anticompetitive municipal action which, though not state-directed, is lawful under state law." *Id.* at 415, n. 45. Chief Justice Burger and Justice Marshall stated they would go somewhat further than Justices Brennan, Powell and Stevens and would require not only a State mandate, but also a showing that an antitrust exemption was essential to the State's regulatory scheme. See 435 U.S. at 417, 425-26.

By pointing out that their conduct complained of in this case "originates with" general State statutes granting cities the powers to zone and to regulate liquor sales, petitioners seek to show a sufficient State mandate for their alleged conspiracy to bar everyone other than the city fathers and their cohorts from the retial sale of alcoholic beverages in Impact. It should be obvious that, assuming the truth of the allegations of conspiracy, the Texas legislature could never have "contemplated" that the general zoning and liquor control laws would be so employed by city officials to stifle those who would dare to compete with them in their private capacities as business men and women.

The Fifth Circuit's decision not only comports with *City of LaFayette*, but is also consistent with this Court's other recent rulings in cases involving the "so-called state action exemption." *Goldfarb v. Virginia State Bar, supra,* 421 U.S. at 788. In *Goldfarb,* for

example, the requisite degree of state involvement was found lacking despite the statutory status of the State Bar as a state agency. There the Court stated:

> Although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondent's activities. Although the State Bar apparently has been granted the power to issue ethical opinions there is no indication in this record that the Virginia Supreme Court approves the opinions. Respondents' arguments, at most, constitute the contention that their activities complemented the objectives of the ethical codes. In our view that is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be *compelled by direction of the State acting as a sovereign*. (Emphasis added).

421 U.S. at 792. Similarly, in this case, while all municipalities in Texas have been given statutory authority to regulate zoning and liquor sales, their activities in that connection—including, certainly, those of petitioners—are neither required by the State nor approved by it after the fact.

In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), a retail druggist sued a private utility claiming that it used its monopoly power in the distribution of electricity to restrain competition in the sale of light bulbs. The utility furnished its residential customers, without additional charge, with almost fifty percent of the most frequently used light bulbs under a program approved, as part of its rate structure, by the Michigan



Public Services Commission. The practice could not be changed by the utility under state law without its filing, and the Commission's approving, a new tariff. Despite those facts, the Court held that the state action defense was not available.

While *Cantor* is not, perhaps, directly applicable to this case since it did not involve a suit against governmental officials, its teachings are important in two respects. First, a majority of the Court reiterated "that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." 428 U.S. at 592-93. Secondly, the Court held that the federal antitrust laws may be applied in areas of the economy pervasively regulated by the State. *Id.* at 595. In that connection, the majority observed that the regulated conduct would not necessarily be required thereby to satisfy inconsistent standards, and stated that "even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's." *Id.* Thus, in the present case, the fact that the State of Texas may have authorized municipalities generally to regulate zoning and liquor matters cannot, of itself, insulate the petitioners from antitrust liability for their own conspiratorial acts.

The decision of the court below is consistent, too, with the holding of this Court in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). There the Court noted that the challenged restraint—a prohibition against advertising by attorneys—was occasioned by "the affirmative command of the Arizona Supreme Court under its Rules 27(a) and 29(a) and its Disciplinary Rule 2-101(B)." 433 U.S. at 360. Since the Arizona

Supreme Court was "the ultimate body wielding the Stae's power over the practice of law" and "the real party in interest," the restraint was held to be, in the language of *Goldfarb*, "'Compelled by direction of the State acting as a sovereign.'" *Id.* at 360-61 (citation omitted). Moreover, the Court noted that the Arizona State Bar operated under the "continuous supervision" of the State's Supreme Court, *id.* at 361, and that "the rules are subject to pointed re-examination by the policy maker—the Arizona Supreme Court—in enforcement proceedings." *Id.* at 362. The Court concluded:

> Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active.

*Id.*

Despite petitioners' contention that the mere existence of Texas statutes authorizing municipalities to enact zoning ordinances and regulate liquor store locations brings this case within the sheltering ambit of *Bates*, it is clear that the two cases are distinguishable. First, unlike the State Bar in *Bates*, the municipality here is under no mandate from the State to impose the restraint in question. Secondly, whereas the Supreme Court of Arizona was continually provided with the opportunity to review in grievance cases the implementation of its mandate by the State Bar, here there is no occasion for the State of Texas to review the exercise by the City of Impact of its authority to regulate zoning and liquor matters. Finally, the record in the case at the



bar does not indicate the existence of any supervision by the State, whereas in *Bates* the "continuous" and "active" supervision provided by the Arizona Supreme Court was stressed repeatedly.

In summary, the decision of the court below is entirely consistent with the rulings of this Court concerning the state action immunity enjoyed by public officials in very limited circumstances. Accordingly, further review by this Court is unwarranted at the present time.

### 3. The decision of the court below does not conflict with decisions of other circuits concerning the standing required of plaintiffs in antitrust cases.

Employing a "Catch-22" brand of logic, the petitioners make much of the fact that the respondent did not purchase his lot in Impact until after the enactment of ordinances precluding the use of that lot for the retail sale of liquor. Respondent cannot have been "injured in his business or property,"[3] they reason, "because so long as the valid zoning ordinance prevents the sale of liquor at that location he cannot obtain the necessary license from the State." (Pet. 18-19). This argument overlooks that the respondent has alleged that the enactment of the zoning ordinance that precludes his entering the liquor business was itself an act in furtherance of the antitrust conspiracy of which he complains. Since it is the validity of that official action under the antitrust laws which is at issue in this case, it can hardly be said that the existence of that ordinance and the legal stumbling block it imposes can deprive

[3]See 15 U.S.C. §15.

the respondent of standing to make his antitrust challenge. The antitrust cases cited by petitioners, *see* Pet. at 19, are distinguishable because in those cases the impossibility of the plaintiffs' entering business was not occasioned by the challenged restraint, but by other circumstances.[4]

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[4]In addition to the antitrust cases cited by the petitioners at page 19 of the Petition, the cases of *Clouser v. David*, 309 F.2d 233 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 929 (1963), and *C.F. Lytle Co. v. Clark*, 491 F.2d 834 (10th Cir. 1974), are cited and discussed in the Petition at pages 17-18. These cases, too, are distinguishable, because neither involves a situation where, as here, the enactment of the zoning ordinance was claimed to be an act in furtherance of a conspiracy to violate the antitrust laws.